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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GENGHIS KHAN ALI STEVENSON, Petitioner, **v.** **DERRAL G. ADAMS, Warden,** Respondent.	08cv1126 W (LSP) **NOTICE OF MOTION AND MOTION TO DISMISS** (No Hearing Required) The Honorable Leo S. Papas

TO PETITIONER GHENGIS STEVENSON PROCEEDING IN PRO SE:

PLEASE TAKE NOTICE that Respondent hereby moves this Court for an order dismissing the Petition for Writ of Habeas Corpus because the Petition is barred by the Statute of Limitations. This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, and on the pleadings filed or documents lodged in this action.

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WHEREFORE, Respondent respectfully requests the Petition be dismissed with prejudice.

Dated: September 3, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
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CERTIFICATE OF SERVICE BY U.S. MAIL

Case Name: **Stevenson v. Adams**

No.: **08cv1126 W (LSP)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 3, 2008, I served the following documents:

(1) NOTICE OF MOTION AND MOTION TO DISMISS; (2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS; and (3) NOTICE OF LODGMENT IN 28 U.S.C. § 2254 HABEAS CORPUS CASE - TO BE SENT TO CLERK'S OFFICE

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Genghis Khan Ali Stevenson
P-46050
California State Prison, Corcoran
P.O. Box 3481
Corcoran, CA 93212

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case: None

Manual Notice List

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing): **Genghis Khan Ali Stevenson** at the above-named address.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 3, 2008, at San Diego, California.

Bonnie Peak	Bonnie Peak
Declarant	Signature

SD2008801728
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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GENGHIS KHAN ALI STEVENSON, Petitioner, **v.** **DERRAL G. ADAMS, Warden,** Respondent.	08cv1126 W (LSP) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS** (No Hearing Required) The Honorable Leo S. Papas

INTRODUCTION

Petitioner Genghis Stevenson seeks habeas corpus relief from a judgment of conviction for possessing a weapon as a prisoner and a sentence of six years imprisonment, entered in Imperial County Superior Court on February 28, 2006. But his Petition is untimely and must be dismissed.

In brief summary, there were three periods of time following finality of Stevenson's state conviction during which no tolling applied which, combined, exceed the one year statute of limitations: (1) a period of eleven days from the date of finality until he constructively filed his first state petition; (2) a period of 256 days between the denial of his first state petition and the constructive filing of his second (and last) state petition, for which tolling cannot apply because the delay between these petitions was unreasonable; and (3) a period of 362 days between the denial of his last state petition and the constructive filing of his current federal Petition.

PROCEDURAL BACKGROUND[1/]

An Imperial County Grand Jury indicted Stevenson on the charges of assault by a state prisoner, battery on a non-confined person, and unlawful possession of a weapon. The indictment further alleged, inter alia, that Stevenson had previously been convicted of robbery and carjacking, which qualified as serious or violent crimes under California's Three Strikes law. (Lodgment 1 (trial court records), indictment.)

Stevenson entered into a negotiated plea agreement with the prosecutor. The agreement provided that Stevenson would plead no contest to possession of a weapon and specified that Stevenson's punishment would be a six-year prison term (the middle term of three years, doubled based on a single strike), to be served consecutively to his current sentence. (Lodgment 1, plea form.)

On February 28, 2006, Stevenson entered a no contest plea, pursuant to the agreement, and admitted one of the two prior strike convictions. The trial court sentenced him to the six-year term, as stipulated by the agreement. (Lodgment 1, minute order 2/28/2006 & abstract of judgment.)

Stevenson did not file a direct appeal.[2/] (Pet. at 2.)

Eventually, though, Stevenson brought collateral attacks against the judgment in the state courts. On May 12, 2006, he signed, and on May 22, 2006, he filed a petition for writ of habeas corpus in the California Court of Appeal. (Lodgment 2.) In that petition, he raised a single claim, which alleged that he was induced to enter a no contest plea based on his counsel's alleged deficiencies.

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1. No records in the possession of counsel for Respondent describe the facts of Stevenson's crime. Since the nature of the crime is not pertinent to resolution of this Motion to Dismiss, the usual statement of facts is omitted.

2. In his Petition, Stevenson lists two habeas corpus actions he brought in the state courts under the section designated "Direct Appeal." He clearly stated, however, for each, that the actions were petitions for writ of habeas corpus. (Pet. at 2 ¶ 11, 12.)

The court of appeal denied the petition on June 29, 2006, concluding that the trial records demonstrated that the plea was knowing and voluntary and Stevenson had not contradicted that evidence. (Lodgment 3.)

About nine months later, on March 13, 2007, Stevenson signed and on March 16, 2007, he filed a petition for writ of habeas corpus, raising the same claim, in the California Supreme Court. (Lodgment 4.) That court denied the petition without comment or citation to authority on June 13, 2007. (Lodgment 5.)

Stevenson signed the Petition now before this Court on June 10, 2008, and the Petition was filed on June 24, 2008. (Pet. at 1, 10.) That Petition raises a single claim: that he suffered ineffective assistance of counsel through counsel's failure to investigate, prepare pretrial motions, or prepare for trial. (Pet. at 6.)

ARGUMENT

I.

THE PETITION IS BARRED BY THE STATUTE OF LIMITATIONS PURSUANT TO 28 U.S.C. § 2244 (D) AND THEREFORE SHOULD BE DISMISSED WITH PREJUDICE

Because the present Petition was filed after April 24, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Smith v. Robbins*, 528 U.S. 259, 268 n.3, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). As amended by AEDPA, 28 U.S.C. § 2244(d) now provides for a limitations period of one year.[3/]

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3. The statute provides as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable

There is no indication that Stevenson ever appealed the judgment. (Pet. at 2.) Accordingly, for Stevenson, his state judgment became final at the expiration of the time period during which he might have brought an appeal. In California, that is sixty days after proceedings have concluded in the state trial court. Cal. Ct. R. 31(d) (now, Cal. Ct. R. 8.308(a)); *Lewis v. Mitchell*, 173 F. Supp. 2d 1057, 1060 (C.D. Cal. 2001).

Since Stevenson's sentence was imposed on February 28, 2006, he had sixty days, until May 1, 2006, to file an appeal. The statute of limitations commenced the next day, and expired one year later, on May 1, 2007,[4/] unless Stevenson is entitled to a later start date or to tolling of the limitations period. As will be seen, Stevenson is not entitled to a later start date, and, although he is entitled to some tolling, he is not entitled to enough tolling to render timely his current Petition, which was not constructively[5/] filed until June 10, 2008, at the earliest.

A. Commencement Of The Limitations Period

Normally, the statute of limitations begins to run on the day following finality, Fed. R. Civ. P. 6(a), unless one of three exceptions apply. 28 U.S.C. § 2244(d)(1)(B)-(D). None of the exceptions applies to Stevenson: there was no state impediment to his seeking further relief; his claims do not rely on any new constitutional right determined by the United States Supreme Court to be retroactive; and the factual predicate for his current claims was known by the time his

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to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

4. The sixtieth day was April 29, 2006, but that was a Saturday. The next court day was Monday, May 1, 2006.

5. Under the mailbox rule of *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988), an incarcerated pro se prisoner's pleading is deemed filed at the moment of delivery to prison officials. This mailbox rule has been extended to both state and federal habeas corpus petitions for purposes of applying the AEDPA statute of limitations. *See Miles v. Prunty*, 187 F.3d 1104, 1106 n.2 (9th Cir. 1999).

conviction was final.[6/]

Thus, the limitations period began to run on the day following finality, to expire on May 1, 2007, absent tolling.

B. Stevenson Is Entitled To Some Statutory Tolling, But Not Enough

A petitioner has the burden of demonstrating facts supporting tolling. *See Pace v. DiGuglielmo*, 544 U.S. 408, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669 (2005); *Gaston v. Palmer*, 417 F.3d 1030, 1034 (9th Cir. 2005) (as amended); *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002). Stevenson appears to be entitled to some statutory tolling, based on the two habeas corpus petitions he filed in the state courts.

1. No Tolling From Finality Of State Conviction Until Filing Of His First State Petition

The conviction was final on May 1, 2006. It appears that Stevenson constructively filed his first state habeas corpus petition on May 12, 2006. (Lodgment 2 at 6 (date of signature). During this period, eleven days of the limitations period elapsed. *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999) (no tolling applies until the filing of a state petition).

2. Statutory Tolling Applies From May 12, 2006, To June 29, 2006

Stevenson's first state habeas corpus petition was pending in the court of appeal, and he is entitled to statutory tolling, from May 12, 2006 (the date of constructive filing), up to the date of decision on June 29, 2006 (Lodgment 3). 28 U.S.C. § 2244(d)(2).

3. No Tolling Applies During The Interval Between His Two State Petitions

After the court of appeal denied the first state petition, a period of about nine months passed before Stevenson filed his second state petition. Although tolling for such intervals may apply to California petitioners, such interval tolling applies only if the petitioner proceeds to the next court without unreasonable delay. *Evans v. Chavis*, 546 U.S. 189, 126 S. Ct. 846, 854, 163 L. Ed. 2d 684 (2006); *Gaston v. Palmer*, 447 F.3d 1165 (9th Cir. 2006). In *Evans v. Chavis*, the United

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6. The operative knowledge is of the important facts, not their legal significance. *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001). Stevenson knew the facts of his sentence and of his counsel's representation before his conviction was final.

States Supreme Court suggested that a reasonable period would be thirty to sixty days. 126 S. Ct. at 854.

Stevenson's delay of nearly nine months is unreasonable. This precludes interval tolling between his two state petitions. Accordingly, no tolling applies from June 29, 2006, up to the date he constructively filed his second state petition, on March 13, 2007. (Lodgment 4.) During this period, another 256 days of the limitations period elapsed. Added to the earlier period of eleven elapsed days, a total of 267 days of the limitations period had been consumed, leaving only ninety-eight days within which Stevenson could file a timely petition.

4. The Limitations Period Expired Between The Time From The Denial Of His Last State Petition And The Filing Of The Current Federal Petition

The California Supreme Court denied Stevenson's last state petition on June 13, 2007. (Lodgment 5.) No statutory tolling applies to the time following that denial and the filing of his federal Petition, because no state petitions were properly pending during that time. 28 U.S.C. § 2244(d); *see Roy v. Lampert*, 465 F.3d 964, 968 (9th Cir. 2006). Accordingly, no tolling could apply from June 14, 2007, until the current Petition was constructively filed on June 10, 2008. (Pet. at 10.)

This period lasted 362 days. But, since Stevenson had only ninety-eight days remaining in the limitations period, the statute of limitations expired several months before the current Petition was filed.

C. Stevenson Is Not Entitled To Equitable Tolling

Although the United States Supreme Court has not determined whether equitable tolling may apply in § 2254 cases, the Ninth Circuit has found such tolling to be applicable in rare cases. But, before equitable tolling may be considered, a petitioner must establish at least two elements "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006) (quoting *Pace v. DiGuglielmo*, 544 U.S. at 408); *Gaston v. Palmer*, 417 F.3d at 1034.

Stevenson has made no claim for equitable tolling, and no basis for such tolling is apparent. Indeed, the lengthy intervals between his petitions demonstrate a lack of diligence, which precludes the application of equitable tolling. Accordingly, the current Petition is untimely.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition with prejudice as untimely and deny any future request for a certificate of appealability.

Dated: September 3, 2008

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

GENGHIS KHAN ALI STEVENSON, Petitioner, **v.** **DERRAL G. ADAMS, Warden,** Respondent.	08cv1126 W (LSP) **NOTICE OF LODGMENT IN 28 U.S.C. § 2254 HABEAS CORPUS CASE** *To Be Sent To Clerk's Office*

These copies are being provided for the use of the Court pursuant to this Court's July 1, 2008 Order. The documents being lodged under this Notice by Respondent are:

1. **Trial court records**, *People v. Stevenson*, case number JCF16209;
2. **Petition for Writ of Habeas Corpus**, case number D048642;
3. **Order Denying Petition**, case number D048642;
4. **Petition for Writ of Habeas Corpus**, case number S149105;

///

5. **Order Denying Petition**, case number S149105.

Dated: September 3, 2008

Respectfully submitted,

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